United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

77-1314

To be argued by
KENNETH V. HANDAL

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1314

B p/s

UNITED STATES OF AMERICA,
Appellee,

—v.—

CHARLES EDWARD MORRISON,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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UNITED STATES COURT OF APPEALS
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FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

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—v.—

CHARLES EDWARD MORRISON,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Charles Edward Morrison appeals from a judgment of conviction entered on July 21, 1977, in the United States District Court for the Southern District of New York, after a three-day trial before the Honorable Robert J. Ward, United States District Judge, and a jury.

Indictment 77 Cr. 398, filed on May 27, 1977, charged Morrison in one count with distribution and possession with intent to distribute of approximately 62.98 grams of cocaine, in violation of Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A). Trial commenced before Judge Ward on June 27, 1977, and concluded on June 29, 1977, when the jury found Morrison guilty.

On July 21, 1977, Judge Ward suspended imposition of sentence and placed Morrison on probation for a period of three years.

Statement of Facts

A. The Government's Case

1. Synopsis

The Government's evidence at trial established that on September 11, 1975, Morrison sold 62.98 grams of cocaine to an undercover agent of the Drug Enforcement Administration (DEA) in the presence of a informant with whom the defendant previously had negotiated. Morrison was positively identified at trial by both the undercover agent and the informant as the dealer of the cocaine in question. (Tr. 67, 76-77, 121-22).*

2. The Arrangements for the Sale

On September 10, 1975, DEA Special Agent Thomas King, Jr., met with John Burton, a paid informant of DEA, at DEA headquarters at 555 West 57th Street, New York, New York. At that meeting Burton told Agent King that he knew a person named "Chuck" who sold ounce quantities of cocaine and who drove a 1967 red Cadillac convertible, bearing New York State license number 314 YIC. (Tr. 119-20, 172, 179). Prior to this time, Burton had met with "Chuck," the defendant Morrison, on approximately fourteen or fifteen occasions at the Joy Social Club, 155 West 132nd Street, New York, New York, and at another social club located at 29 East 131st Street, New York, New York. On approximately five or six of these occasions during 1974 and 1975, Burton had purchased cocaine from Morrison at one or the other of these social clubs. (Tr. 122-23).

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*"Tr." refers to the pages of the trial transcript. "Br." refers to appellant's Brief.

King asked Burton if he could arrange an introduction between an undercover agent and "Chuck." Burton agreed to do so and promised to contact Agent King after a meeting with Morrison was scheduled. (Tr. 75, 120, 172-73).

Later that same day Burton went to the Joy Social Club, 155 West 132nd Street, New York, New York, where he met with Morrison. Burton told Morrison that he had a cousin who wanted to purchase a couple of ounces of cocaine. Morrison readily agreed to the proposed sale, said that there would be no problem getting the cocaine, and set a price of $1,000 per ounce. Burton and Morrison then agreed to meet at three o'clock the next afternoon to proceed with the sale. (Tr. 121-22, 125).

At about noon the next day, September 11, 1975, Burton met with King and DEA Special Agent Robert Baker at DEA headquarters. Burton advised the agents of his meeting with "Chuck" and plans were made for Agent Baker to purchase two ounces of cocaine from Morrison later that day at the established $1,000 per ounce price. (Tr. 123-25, 173).

3. Morrison Sells the Cocaine to Baker

Shortly after two o'clock that afternoon, Agents Baker and King, together with Burton, left DEA headquarters in an undercover vehicle and drove to the Joy Social Club. (Tr. 64-65, 124-25, 173-74). Baker and Burton entered the club. As they approached the bar inside, Burton introduced Agent Baker to Morrison, whom he referred to as "Chuck." (Tr. 66-67, 125-26). Morrison then told Burton that he did not keep the cocaine in the club anymore because the police were watching the place, but that he would go and get it. (Tr. 125-26). Morrison immediately left the club to obtain the narcotics. Upon

his return a few minutes later Morrison indicated to Burton and Agent Baker that he had the cocaine, and motioned them to the back of the club. (Tr. 68-69, 126-27).

Once Morrison, Baker and Burton were gathered in a room at the back of the club, Morrison sat down at a table and poured cocaine from a plastic bag on to a mirror. (Tr. 69-70, 127).* Morrison measured two ounces of cocaine with a quarter-ounce measuring spoon and put the cocaine back into the plastic bag. (Tr. 70, 128). Pointing out that the cocaine was of good quality, he told Agent Baker that the price now was $1,100 per ounce, $100 per ounce more than that originally set by him. (Tr. 71, 128). Baker paid Morrison $2,200 for the two ounces of cocaine and, after wrapping the plastic bag containing the cocaine in a piece of tinfoil, placed the cocaine in his pocket. (Tr. 72-73, 128-29). Baker and Morrison also discussed possible future purchases of cocaine, and the meeting shortly terminated. (Tr. 73, 128). Baker and Burton left the club together, met with Agent King a few blocks away, and eventually returned to DEA headquarters where the cocaine obtained from Morrison was stored. (Tr. 74-75, 129, 175).**

At trial, Burton unequivocally identified Morrison as the person with whom he had negotiated the September 11, 1975 purchase and with whom he had met on approximately fourteen or fifteen prior occasions, several times to purchase cocaine. (Tr. 121-23). The cross-examination

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*Morrison, Agent Baker and Burton were the only persons in the back room. (Tr. 69, 127).

**Subsequent analysis of the substance purchased by Baker from Morrison showed it to contain cocaine to have a net weight of 62.98 grams. (GX. 2).

of Burton dealt primarily and exhaustively with Burton's criminal record and his ties to DEA. (Tr. 131-79).*

Agent Baker also identified Morrison at trial without qualification as the person from whom he had purchased the cocaine on September 11, 1975. (Tr. 67, 76-77).** On cross-examination, Baker identified and was asked about the agency report prepared by him on September

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*Prior to presentation of the Government's case, an identification hearing was held at the request of Morrison's counsel. Burton testified at this hearing and accurately described Morrison with specific detail, in the absence of the jury and of Morrison, whose presence at this part of the proceeding was waived to facilitate model circumstances for an accurate identification. (Tr. 53-60). At the conclusion of the hearing, defense counsel withdrew his opposition to Burton's identification of Morrison in light of Burton's testimony at the hearing that he had met with Morrison on approximately fifteen occasions prior to the transaction charged and that he had not been shown any photographs of Morrison nor seen Morrison in any "showup" situation. (Tr. 62, 202).

Burton testified at the hearing that between late 1974 and the date of the transaction charged, he had met with Morrison approximately fifteen times at either the Joy Social Club, 155 West 132nd Street, New York, New York, or at the other social club located at 29 East 31st Street, New York, New York. (Tr. 54). At approximately five or six of these meetings Burton purchased cocaine from Morrison. (Tr. 54). Burton accurately described Morrison as five feet eight or five feet ten inches tall, about 180 pounds, black, of medium complexion, with a short afro and a small goatee under his mouth and above the chin. (Tr. 55-56). On cross-examination, Burton testified that the last time he had seen Morrison was in late 1976 at the Joy Social Club and that since Morrison's arrest he had not been shown any photographs of him nor had he examined or been given any descriptions of the defendant. (Tr. 56-60). During the period between 1974 and late 1976 in which Burton was in contact with Morrison, Morrison's appearance did not change. (Tr. 60).

**This identification was made independently of Burton's identification; Baker and Burton had not discussed their testimony with each other. (Tr. 78, 133-34, 171).

15, 1975, in which he had described "Chuck" as being five feet ten inches in height, 220 pounds in weight, of West Indian extraction, and as having a receding hairline. (Tr. 94-95). On redirect examination, Agent Baker testified that Morrison's rate and manner of speech led him to believe that he was West Indian. (Tr. 112).

4. The Arrest

In the hope of pursuing their investigation and locating Morrison's cocaine source, the agents did not arrest the defendant on September 11, 1975, the day the cocaine was purchased from Morrison. (Tr. 75). These plans were thwarted when, despite numerous attempts by Agents Baker and King, plus the informant Burton, to locate Morrison subsequent to the day of the purchase, they were unsuccessful in finding the defendant again. (Tr. 75-76, 129-30, 177). However, during this investigation, Agent King determined that the 1967 red Cadillac, New York State license plate number 314 YIC—about which Burton had informed Agent King prior to the transaction (Tr. 172)—was registered to one John C. Brown (Tr. 179). Consequently, on April 12, 1977, an arrest warrant was issued for John C. Brown, a/k/a "Chuck." (DX. C).

On April 14, 1977, in an attempt to locate "Chuck," Baker and DEA Special Agent Richard Holmes went to the social club located at 29 East 131st Street, New York, New York,* a few blocks from the Joy Social Club. (Tr. 202-03). Agent Holmes went to the door of the social club, asked for "Chuck" and was told that he was not there. (Tr. 203).

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*Burton had met with Morrison on prior occasions at this social club on 131st Street as well as at the Joy Social Club. (Tr. 122-23).

The next day, however, the agents' efforts were successful. Holmes and Baker, along with another DEA Special Agent, returned to this club on April 15, 1977. Agent Holmes went to the door of the club and again asked for "Chuck." Morrison came to the door and acknowledged to Agent Holmes that he was "Chuck." At the same time Agent Baker independently identified Morrison as the person from whom he had purchased the cocaine, and Morrison immediately was placed under arrest. (Tr. 76-77, 203-05).*

Agent King testified that after his arrest, Morrison stated that the 1967 Cadillac, license number 314 YIC, was his cousin's car and that he (Morrison) used the vehicle. Morrison also advised King that John C. Brown was the person from whom his cousin had bought the car and that his cousin never changed the registration to his own name. (Tr. 182-84).** On cross-examination Agent King testified that the description of Morrison obtained at the time of his arrest on April 15, 1977 indicated that he was approximately five feet eight inches tall and weighed 180 pounds. (Tr. 201).***

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*When Morrison was arrested he had in his possession two one-quarter ounce measuring spoons with traces of cocaine on each spoon. Judge Ward sustained Morrison's objection to admission of this evidence as part of the Government's direct case on the ground that its probative value was outweighed by its prejudicial effect. (Tr. 20).

**Investigation also indicated that the car had received a parking summons while stationed on Gerard Avenue, Bronx, New York, at a location close to Morrison's home at 690 Gerard Avenue. (Tr. 187-88).

***In addition, upon his arrest, Morrison informed Agent King that he was born in North Carolina, though Agent King noticed no southern accent. (Tr. 201).

B. The Defense Case

Morrison presented no affirmative case. On cross-examination of Agent Baker, Morrison introduced in evidence the DEA report of September 15, 1975, containing Agent Baker's description of "Chuck." (Tr. 112).*

ARGUMENT

The Evidence Was Sufficient for the Jury to Find Defendant Guilty Beyond a Reasonable Doubt.

Morrison's sole contention on appeal is that there was insufficient evidence from which the jury could have concluded that he was the seller of the cocaine. In formulating this argument defendant relies upon alleged inconsistencies between Agent Baker's earlier report and his in-court identification of Morrison. He further seeks to dismiss Burton's independent trial identification of him as somehow the fabrication of an interested Government witness. By these contentions defendant tries to suggest, without any basis, that his conviction amounted to a manifest miscarriage of justice. Morrison's claims, however, all were forcefully argued to the jury, which, by its verdict, rejected them after a full opportunity to assess the credibility of the witnesses and to measure identifications of Morrison against its own observations of defendant's appearance. Moreover, the jury in this case was carefully focused upon the disputed issue of identification now raised on appeal. In such circumstances, defendant's attempt to have this Court sit as a "super jury" must be rejected. *United States* v. *Birnbaum*, 373 F.2d 250, 257

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*The colloquy between the District Court and Morrison that is set forth in appellant's brief at 7-8 occurred at Morrison's sentencing on July 21, 1977. (Tr. 311).

(2d Cir.), *cert. denied*, 389 U.S. 837 (1967). *See also United States* v. *Daley*, Dkt. No. 77-1262, slip op. 109, 116-17 (2d Cir. October 20, 1977); *United States* v. *Sears*, 544 F.2d 585, 586 (2d Cir. 1976). Viewing the evidence in the light most favorable to the Government, as, of course, this Court must, *Glasser* v. *United States*, 315 U.S. 60, 80 (1942); *United States* v. *Falcone*, 544 F.2d 607, 610 (2d Cir. 1976), *cert. denied*, 430 U.S. 916 (1977), it is clear that the jury fairly and properly could conclude that Morrison was guilty as charged beyond a reasonable doubt.

The Government's evidence at trial included the two unequivocal and positive identifications by Burton and Agent Baker of Morrison as the person from whom they had purchased the cocaine. (Tr. 76-77, 121-22). Contrary to defendant's suggestion, these identifications both were reliable and consistent.

Burton had met with Morrison on approximately fourteen or fifteen occasions at the Joy Social Club and at the social club on 131st Street, prior to the cocaine purchase charged in the indictment. At five or six of these meetings, Burton had purchased cocaine from Morrison. (Tr. 122-23). Thus, Burton had several full and meaningful opportunities to observe defendant under circumstances that negated any possible error. Indeed, the reliability of Burton's identification was made apparent by the fact that he accurately described Morrison in detail at a preliminary identification hearing, in the absence of the jury and of Morrison, despite the fact that he had not seen defendant in over a year. (Tr. 53-60).*

Similarly, Agent Baker's in-court identification of Morrison was certain, and based upon his clear recollec-

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**See* footnote at page 5 *supra*.

tion of defendant's appearance during their September, 1975 meeting when the cocaine deal was consummated. Moreover, at the time of Morrison's subsequent arrest in April, 1977, Agent Baker independently confirmed that Morrison was the person with whom he had earlier transacted the sale.

Morrison claims, however, that Agent Baker's in-court identification was irreconcilably inconsistent with his description of "Chuck" in an earlier investigative report. As we have indicated earlier, this claimed weakness in Baker's testimony was argued extensively to the jury by defendant and thus can be renewed here only by an unwarranted disregard for the jury's sound verdict. Moreover, the jury had Baker's report before it, and based upon the jury's own observations of defendant in court plainly was entitled to conclude that the description was reasonably consistent with Morrison's appearance and that any possible discrepancies were not significant.*

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*Agent Baker's description in the agency report was inaccurate by two inches in height and forty pounds in weight. The height difference is not surprisingly large, particularly since Burton had described Morrison at the identification hearing as being five feet eight inches or five feet ten inches in height. (Tr. 55). The discrepancy in weight may be explicable by the nineteen months which elapsed between the cocaine sale and Morrison's arrest. Moreover, Baker's statement that "Chuck" was of West Indian extraction was explained by him as resulting from Morrison's rate and manner of speech. (Tr. 112). Baker also testified, as had Burton at the identification hearing, that Morrison had sideburns and a goatee at the time of the cocaine sale, which he also had as he appeared at trial. (Tr. 55-56, 95).

Defendant now suggests as significant that Baker described "Chuck" in the agency report as having a receding hairline, though only passing mention was made of this on cross-examination and in summation by defense counsel. (Tr. 95, 239). Appellant's brief states that Morrison has a "full head of black hair." (Br. at 9). First, there is no evidence in the record of Morrison's having a full head of hair. Second, the jury from viewing Morrison, could reasonably conclude that Baker's description of Morrison's hairline in the agency report was accurate.

Given the jury's opportunity to view Morrison during the course of the trial and its awareness of the circumstances surrounding Morrison's dealings with Burton and Baker, the alleged discrepancies in Baker's earlier report simply do not provide any grounds for overturning the jury's verdict. *See United States* v. *Prada*, 451 F.2d 1319 (2d Cir. 1971); *United States* v. *Dickerson*, 347 F.2d 783 (2d Cir. 1965); *United States* v. *Murray*, 527 F.2d 401, 410-11 (5th Cir. 1976); *United States* v. *McClain*, 469 F.2d 68 (3d Cir. 1972).

Furthermore, apart from the sure identifications of Morrison by both Baker and Burton,* there was additional evidence to corroborate the fact that Morrison was the seller of cocaine. On September 10, 1975, the day before the transaction, Burton told Agent King that the cocaine dealer to whom he would introduce an undercover agent drove a 1967 red Cadillac convertible with license number 314-YIC. (Tr. 172). Morrison subsequently admitted, after his arrest on April 15, 1977, that he drove that specific vehicle. (Tr. 182-84). Burton also advised the agents prior to the deal that he had met with "Chuck" on several occasions at the social club on 131st Street, the same precise club where Morrison ultimately was arrested. Moreover, on the day of his arrest, Morrison readily answered to the name "Chuck," the same nickname used by him throughout his earlier dealings with both Burton and Agent Baker. In sum, given the in-court identifications by both Burton and Baker, and the other circumstantial evidence that corroborated both

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* Morrison makes no specific attack on Burton's positive identification of him, other than to renew his general argument that Burton was an impeachable witness. This claim presents no more than a credibility issue, one traditionally and properly reserved for the jury's exclusive determination. The jury was fully and properly instructed on the informant's credibility, and Morrison makes no claim otherwise. (Tr. 277-78). In any event, as we now show in the text, the jury had independent evidence that corroborated Burton's identification.

of these identifications, the jury clearly was entitled to reject Morrison's defense that there existed another "Chuck" with so many matters in common with Morrison.*

Finally, Morrison's contention that the alleged discrepancies prevented a true verdict on the issue of his identification is completely dispelled by the fact that Judge Ward carefully and specifically presented the identification issue to the jury. Thus, at defendant's request, the District Court charged the jury at length that it was the Government's burden to prove defendant's identity beyond a reasonable doubt.** The trial judge further gave a careful and thorough explication of the factors to

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*Although defense counsel often will attempt, as here, to advance their cause on appeal by suggesting that an innocent man was convicted, the suggestion in this case is utterly groundless. Indeed, to suppose that Morrison is an innocent man wrongly convicted requires one to believe not only that Burton, for no apparent reason, framed him, but that Burton was able to create a false story in support of that plan even *before* the DEA agents negotiated with "Chuck" in September, 1975. Thus, it bears emphasis that before Baker met with Morrison on September 11, 1975, Burton already had described the cocaine dealer as the driver of the very car which Morrison subsequently admitted he used, and further that Burton had particularized to the agents his regular meeting haunts with Morrison—the two social clubs respectively where the cocaine deal took place and where Morrison later was arrested. The unwarranted claim of innocence further requires one to believe that Morrison coincidentally matched significant aspects of Baker's written description, that the trained agent Baker was mistaken in his identification, that both Baker and Burton independently mis-identified the same individual, and that there exists another 5'8", 180-pound, black male, with a fast rate of speech, a goatee and similar sideburns, who goes by the name "Chuck," drives the same distinctive red Cadillac, and who frequents the very same social clubs.

** The defense of incorrect identification was fully exposed to the jury, and the jury was properly instructed by the District Court. No contention is made otherwise.

be considered in resolving the identity question and specifically instructed the jury on the ways to evaluate the identification testimony, noting that such evidence "must be carefully scrutinized".*

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*The District Court charged on the question of identity as follows:

> "In a case such as this, testimony that is offered to prove the identity must be carefully scrutinized. The burden of proof is on the government with reference to every element of the crime charged. I have already mentioned three elements. In addition, the goverment has the burden of proving beyond a reasonable doubt the identity of the defendant as the perpetrator of the crime charged.
>
> In appraising the identification testimony of a particular witness, you should take into account the following factors, and in addition to the factors which I give you, again you will use your plain everyday common sense:
>
> One. Was the identification made by the witness after the offense the product of his own recollection? If the identification by the witness may have been influenced by circumstances under which the defendant was presented to him for identification, you should consider that identification with great care.
>
> Two. You may take into consideration the number of times the informant allegedly met with the defendant, the length of time that elapsed between the occurrence of the crime and the next time the witness saw the defendant, and all the circumstances, including place and duration of the September 11, 1975 meeting, which was alleged to have occurred at the Joy Social Club, as well as the interest in the outcome of the case of persons making identification.
>
> Three. The credibility of each identification witness should be considered in the same light as the other witnesses, whether he is truthful, whether he had the capacity to make a reliable observation on the matter covered by his testimony. (Tr. 279-80).
>
> * * * * *
>
> If you believe that the government has proven beyond a reasonable doubt that the defendant was the individual who sold two ounces of cocaine to Agent Baker and Johnny Burton on September 11, 1975, and has proved all three of the elements of the charge in the indictment which I mentioned earlier beyond a reasonable doubt, you will find the defendant guilty.

[Footnote continued on following page]

In these circumstances, it is clear that the issue of identification was squarely placed before the jury and the jury's verdict of guilty was both trustworthy and warranted by the evidence.*

> If you believe that the government has not proved the identity of the seller and all three elements of the charge beyond a reasonable doubt, you should find the defendant not guilty. (Tr. 283).

*Indeed, "[i]t is now settled beyond argument that the identification of a criminal actor by one person is itself evidence sufficient to go to the jury and support a guilty verdict. . . ." *United States* v. *Holley*, 502 F.2d 273, 274 (4th Cir. 1974); *see Neil* v. *Biggers*, 409 U.S. 188 (1972); *United States* v. *Campo*, 414 F.2d 765 (2d Cir. 1969).

The cases cited by Morrison are entirely inapposite. (Br. at 11). In *United States* v. *Musquiz*, 445 F.2d 963 (5th Cir. 1971), the Court reversed the conviction because, of the two "identification" witnesses at trial, one said that she could not identify the defendant and the other gave an ambivalent identification, there were no other connecting or corroborating facts or circumstances, and no guilty knowledge of the crime was shown. *Id.* at 965-66. In *United States* v. *Johnson*, 427 F.2d 957 (5th Cir. 1970), the sole "identification" witness said that she could not positively identify the defendant, and there were no other connecting or corroborating facts or circumstances. *Id.* at 961. In *United States* v. *Luck*, 447 F.2d 1333 (6th Cir. 1971), the Court's reversal was based on its findings that the only identification at trial should have been suppressed, that the other eyewitnesses to the crime, after having the defendant exhibited to them on two occasions prior to trial, could state only that the defendant resembled the perpetrator, and that there was no other evidence to connect the defendant to the crime. In *Hendrix* v. *United States*, 327 F.2d 971 (5th Cir. 1964), the conviction of one defendant was reversed because the only evidence against her was testimony of her resemblance to a perpetrator and her presence in the company of persons more clearly tied to the crime. Certainly, these cases are not controlling here where the identifications were positive and consistent, and where no claim was or could have been made that the identifications should have been suppressed as the product of a suggestive earlier out-of-court identification which gave rise to a substantial possibility of irreparable mis-identification. *See Manson* v. *Brathwaite*, — U.S. —, 97 S. Ct. 2243 (1977).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Robert J. Jossen being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 14th day of November, 1977, he served a copy of the within brief by placing the same in a properly postpaid franked envelope addressed:

Steven L. Barrett, esq.
Federal Defenders Services Unit
Legal Aid Society
Rm. 509
United States Courthouse
Foley Square, N.Y., N.Y. 10007

And deponent further says that he sealed the said envelope and placed the same in the mail box for mailing at One St. Andrew's Plaza, Borough of Manhattan, City of New York.

Robert J. Jossen

Robert J. Jossen

Sworn to before me this
14th day of November, 1977

Jeanette Ann Graves

JEANETTE ANN GRAVES
Notary Public, State of New York
No. 24-1941575
Qualified in Kings County
Commission Expires March 30, 1979